(8)

No. 96-663

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARVIN KLEHR and MARY KLEHR
Petitioners,

v.

A.O. SMITH CORPORATION and
A.O. SMITH HARVESTORE PRODUCTS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND AMERICAN HONDA MOTOR COMPANY, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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38 pp

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Statutes

Legislative History

Other Authorities

INTEREST OF THE *AMICI CURIAE*

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States. ACLI represents the interests of 577 member life insurance companies. Many of ACLI's members have been forced to defend themselves against spurious civil RICO lawsuits.

American Honda Motor Company, Inc. ("Honda") is the American distributor of Honda automobiles, motorcycles, all-terrain vehicles, and other motorized vehicles. Honda, like so many other legitimate businesses, has found itself subject to lawsuits seeking treble damages under RICO. In particular, it is currently defending numerous lawsuits brought by Honda dealers arising out of the convictions of several of Honda's executives for defrauding *Honda* by misusing their positions to obtain bribes from dealers in exchange for, *inter alia*, preferential treatment with respect to the award of new Honda dealerships. The plaintiffs in the cases against Honda have submitted an *amicus* brief arguing for the broadest possible accrual rule. Honda accordingly submits this brief to apprise the Court why such an approach is fundamentally misguided. In this brief, we neither respond to the factual allegations of the plaintiff-dealers nor provide a point-by-point reply to their legal arguments. This is, after all, not a case between Honda and its dealers. Instead, we provide an overall framework for the consideration of the accrual issue and respond to the key criticisms leveled by petitioners, their *amici*, and some of the lower courts against the "injury discovery" accrual rule and the Clayton Act accrual rule, which we endorse as being the most consistent with the Court's prior RICO decisions.[1]

SUMMARY OF THE ARGUMENT

In *Agency Holding Corp.* v. *Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987), this Court held that the Clayton Act's

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[1] Counsel for the petitioners and counsel for the respondents have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

four-year statute of limitations applies to civil RICO claims. Because this Court already has determined that the Clayton Act is the appropriate source from which to borrow the statute of limitations for RICO, it is eminently logical to borrow the Clayton Act's accrual rule as well. Under the Clayton Act, a claim accrues and the statute of limitations begins to run when the putative plaintiff suffers an injury caused by the putative defendant's violation of the statute.

If, contrary to our arguments, the Court is not disposed toward borrowing the Clayton Act rule intact, we submit that the "injury discovery" rule appropriately balances the important federal interest in cutting off stale claims against the interest in adequately vindicating RICO's purposes. By contrast, both the "injury and pattern discovery" rule utilized by the court below and the "last predicate act" rule endorsed by petitioners and their *amici* give inadequate weight to the concerns underlying statutes of limitation. Moreover, they would represent pure judicial policy-making.

Finally, equitable tolling doctrines, such as fraudulent concealment, apply to civil RICO suits. Those doctrines, however, do not avail those plaintiffs who fail to exercise due diligence in identifying and pursuing their claims.

ARGUMENT

Petitioners' brief, the brief of their *amici*, and many of the lower court decisions on this issue suffer from the same shortcoming: They ignore the import of this Court's decision in *Agency Holding Corp.* v. *Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987). Accordingly, in Part I of this brief, we show how this Court's decision in *Agency Holding* compels adoption of the Clayton Act accrual rule for civil RICO claims. We then turn in Parts II and III to explaining why, if some "discovery" requirement is to be superimposed, that requirement should be limited to the existence of the injury and should not extend to the existence of a "pattern of racketeering," which is the approach taken by the court

below, or to the existence of the "last predicate act" that is part of the pattern, which is the rule advanced by petitioners and their *amici*. Finally, in Part IV, we demonstrate that equitable principles do not toll the running of the statute of limitations for would-be plaintiffs who have not diligently investigated and pursued their claim.

I. THIS COURT'S DECISION IN *AGENCY HOLDING* COMPELS THE ADOPTION OF THE CLAYTON ACT'S ACCRUAL RULE.

A. This Court Has Held That Congress Deliberately Used The Clayton Act As The Model For The Civil RICO Remedy.

In *Agency Holding*, this Court held that the Clayton Act's 4-year statute of limitations governs civil RICO claims. As this Court explained, "[e]ven a cursory comparison of the two statutes reveals that the civil action provision of RICO was patterned after the Clayton Act." 483 U.S. at 150. In particular, this Court noted the nearly identical phrasing of the two statutes and the common purpose to remedy the same type of injury, namely an injury "in [the plaintiff's] business or property" caused by the defendant's illegal conduct. *Id.* at 150-151.

Most importantly, this Court canvassed the legislative history of RICO and discovered that "[t]he close similarity of the two provisions [was] no accident." *Agency Holding*, 483 U.S. at 151. To the contrary, Congress expressly modelled the civil RICO remedy on the Clayton Act. Although the original version of the bill contained no civil remedy, the House Judiciary Committee adopted a proposal by Representative Steiger to add "a private treble-damages action 'similar to the private damage remedy found in the anti-trust laws.'" *Id.* at 152 (quoting *Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess., 520 (1970)). During the floor debate in the House of

Representatives, both the bill's sponsor and Representative Steiger compared the bill's civil remedy to that of the Clayton Act. See *Agency Holding*, 483 U.S. at 152 (citing 116 Cong. Rec. 27,739, 35,295 (1970)). The Senate then simply adopted the bill as amended in the House. See 116 Cong. Rec. 36,296 (1970). This history led this Court to conclude that it was "the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act." *Agency Holding*, 483 U.S. at 152.

Agency Holding thus points the way to answering the question presented: The Clayton Act provides both the applicable statute of limitations *and* the accrual rule for civil RICO claims. The same reasons that led the Court to borrow the Clayton Act's statute of limitations equally compel adoption of that Act's accrual rule as well.

First, *Agency Holding* rests upon this Court's conclusion that Congress intended to model RICO's civil remedy upon that of the Clayton Act. See *Agency Holding*, 483 U.S. at 152; *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 368 (1991) (Stevens, J., dissenting) (noting that "in [*Agency Holding*], the Court found an explicit intent to pattern the RICO private remedy after the Clayton Act's private antitrust remedy"). Both the Clayton Act's statute of limitations and its accrual rule were well established when Congress enacted RICO.[2]

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[2] Congress had amended the Clayton Act in 1955 to establish a uniform four-year limitations period. See Act of July 7, 1955, Pub. L. No. 84-137, 69 Stat. 283 (codified at 15 U.S.C. § 15b). As this Court recognized in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), the rule for determining when an antitrust claim *accrues* — whether under state limitations statutes or the 1955 uniform federal period — was an established component of antitrust law well before RICO was enacted in 1970. See, *e.g.*, *Crummer Co.* v. *Du Pont*, 223 F.2d 238, 247-248 (5th Cir. 1955) (holding that antitrust claim accrues upon "doing of the first wrongful act with resulting damages"); *Foster & Kleiser Co.* (continued...)

Thus, just as this Court found it unthinkable that Congress intended a statute of limitations other than that of the Clayton Act to govern civil RICO suits, so too it is inconceivable that Congress intended some other accrual rule to apply to civil RICO claims. Absent evidence of some contrary legislative intent, for this Court to apply some other accrual rule drawn from a different area of law would be nothing less than judicial speculation in disregard of presumed congressional intent. *Cf. Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (noting that, when a common law principle is well-established at the time Congress acts, "the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident'") (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)).

Second, this Court has recognized that a decision to "borrow" a statute of limitations does not license the Court selectively to pick-and-choose exactly which parts to "borrow." Addressing the appropriate statute of limitations for the implied right of action under SEC Rule 10b-5, this Court rejected the idea of borrowing one component of the 1934 Act's explicit one-year/three-year statute of limitations, while substituting for the other component a case-by-case

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[2] (...continued)
v. *Special Site Sign Co.*, 85 F.2d 742, 751 (9th Cir. 1936) ("The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time."); *Bluefields S.S. Co.* v. *United Fruit Co.*, 243 F. 1, 20 (3d Cir. 1917) ("The statute began to run when the cause of action arose, and the cause of action arose when the damage occurred."), appeal dismissed, 248 U.S. 595 (1919); *Gaetzi* v. *Carling Brewing Co.*, 205 F. Supp. 615, 618 (E.D. Mich. 1962) ("The cases uniformly hold that a cause of action for damages under the antitrust laws does not arise with the formation of an illegal conspiracy, but rather when 'the plaintiff's interest is invaded to his damage.'") (quoting *Suckow Borax Mines Consol.* v. *Borax Consol.*, 185 F.2d 196, 208 (9th Cir. 1950)).

laches defense. *Lampf*, 501 U.S. at 362 n.8. The Court commented that "such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid." *Ibid.*

As with the two-pronged statute of limitations borrowed in *Lampf*, the Clayton Act's accrual rule is "indivisible" from the Clayton Act's statute of limitations. So too, cobbling together the Clayton Act's statute of limitations with some alien accrual rule would constitute "the type of judicial policymaking that [this Court's] borrowing doctrine was intended to avoid." *Lampf*, 501 U.S. at 362 n.8.

Third, the lower federal courts repeatedly have consulted antitrust law to resolve other statute-of-limitations-related issues in civil RICO suits. Several district courts have adopted the Clayton Act's accrual rule for civil RICO actions, see *Gilbert Family Partnership* v. *Nido Corp.*, 679 F. Supp. 679, 686 (E.D. Mich. 1988); *Armbrister* v. *Roland Int'l Corp.*, 667 F. Supp. 802, 824 (M.D. Fla. 1987),[3] and the leading academic commentator is in accord with this view. See 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 6.5.5, at 447-448 (1991) ("Presumably the accrual standards developed by the lower federal courts in 15 U.S.C. § 15b civil antitrust litigation should be equally applicable to civil enforcement RICO actions.").

Moreover, several circuits have applied the Clayton Act's "separate accrual" rule to civil RICO claims. See *Bankers Trust Co.* v. *Rhoades*, 859 F.2d 1096, 1103-1104 (2d Cir. 1988); *State Farm Mut. Auto. Ins. Co.* v. *Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). The Second

[3] That no circuit has adopted the Clayton Act's accrual rule should give this Court no pause. In *Agency Holding*, this Court borrowed the Clayton Act's statute of limitations for civil RICO causes of action, even though no circuit had done so. See 483 U.S. at 149.

Circuit acknowledged civil RICO's legislative history and its similarity to the Clayton Act, concluding:

> "In light of these similarities, we have little trouble in concluding that the same statute which lends its four-year limitation period to civil RICO actions should also lend its rule of accrual in determining when the four-year period begins to run." *Bankers Trust*, 859 F.2d at 1104.[4]

Even the petitioners rely upon antitrust law to argue for the "separate accrual" rule, though they inexplicably dismiss the underlying antitrust accrual rule itself. Compare Pet. Br. at 42 ("*Zenith*'s 'separate accrual rule' creates a new RICO cause of action each time a plaintiff suffers an injury during the limitations period") with *id.* at 25 n.7 (rejecting Clayton Act accrual rule generally).

In short, having concluded that Congress chose to model the civil RICO remedy on the Clayton Act and having already held that the Clayton Act statute of limitations applies to civil RICO cases, this Court ought to take the logical next step and hold that the Clayton Act accrual rule governs in civil RICO cases as well.[5]

[4] Although purporting to borrow the Clayton Act's accrual rule, the Second Circuit in fact adopted an injury discovery rule that is distinct from the Clayton Act rule. See *Bankers Trust*, 859 F.2d at 1103, 1105.

[5] *Amicus* Forbes claims that the Clayton Act accrual rule does not adequately take into account RICO's "pattern" element. Forbes Am. Br. at 28. Such criticism ignores the fact that a RICO claimant does not recover for injuries caused by the "pattern" but rather for injuries caused by the predicate acts themselves. See *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 497 (1985) ("Any recoverable damages occurring by reason of a violation of § 1962(c) [of RICO] will flow from the commission of the predicate acts.").

B. Under The Clayton Act, The Cause Of Action Accrues And The Statute Of Limitations Begins To Run When The Plaintiff Is Injured By The Defendant's Illegal Conduct.

This Court has defined the Clayton Act's accrual rule quite succinctly: "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith*, 401 U.S. at 338; 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 338b, at 145 (1995). Thus, as a general matter, the statute of limitations for treble-damages claims under the antitrust laws begins to run as soon as the anticompetitive conduct causes "injury", irrespective of the plaintiff's "knowledge" of any of the elements of the accrued claim. See, *e.g.*, *Information Exch. Sys., Inc.* v. *First Bank Nat'l Ass'n*, 994 F.2d 478, 484 (8th Cir. 1993) (noting that, subject to an exception for fraudulent concealment, "[a] cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business").

While *some* civil RICO cases may be complex or difficult to discover, the typical civil RICO case surely involves acts no more complicated or secretive than the conduct concealed in a typical antitrust conspiracy case. Yet, as noted above, the Clayton Act's statute of limitations and its accompanying accrual rule have existed and worked well for decades. If the combination of a four-year limitations period with an accrual rule focused upon the time of the injury had worked a substantial hardship on antitrust plaintiffs or undermined the deterrent effect of the civil antitrust remedy, Congress surely would have changed one or the other.

In fact, the Clayton Act's limitations period and accrual rule are manifestly reasonable. To begin with, contrary to the assertions of petitioners and their *amici*, four years is not an unreasonably short time to "discover" the basis for bringing a lawsuit. Indeed, the four-year limitations period is longer than the limitation periods under many State

limitation statutes, which applied to antitrust actions before 1955, see S. Rep. No. 619, 84th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S.C.C.A.N. 2328, 2332, and it is longer than the three-year period of repose Congress has established for securities fraud actions. *Lampf*, 501 U.S. at 362.[6] Moreover, as we now discuss, equitable tolling principles and the separate accrual rule are available, in appropriate cases, to mitigate any potential harshness in the Clayton Act's accrual rule.

C. The "Separate Accrual" Rule As Applied Under The Clayton Act Would Mitigate Any Potential Harshness Associated With Adoption Of The Clayton Act's Accrual-Upon-Injury Rule.

1. Applying the general Clayton Act accrual rule to civil RICO suits by individuals, each of whom was injured by a single predicate act that is part of the requisite pattern, is straight-forward: The claim accrues when the particular predicate act injures the plaintiff. So, for example, where an illegal scheme targets numerous victims but each victim is injured only by one predicate act in the pattern, each victim's claim accrues upon his or her injury.

In the context of multiple predicate acts causing injury to the same person or suits seeking recovery for future injuries, principles developed under the Clayton Act also guide the analysis for civil RICO claims. An example of the former situation is a scheme to extort or defraud a single victim involving multiple predicate acts, each of which may cause injury to that victim. An example of the latter situation is a

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[6] To put things in perspective, four years is the duration of an entire college education. Four years is the period that the Constitution fixes for the President to accomplish the objectives of that office. In four years, claimants will bring tens of thousands of civil suits in federal courts, including huge numbers of RICO claims. And, during a four-year period, this Court will decide 300 to 400 cases on the merits and fill 16 volumes of the U.S. Reports.

scheme to destroy the victim's business through various, roughly contemporaneous predicate acts, which though not initially successful, sufficiently weaken the business such that it fails five years later.

This Court has explained how the general Clayton Act accrual rule addresses similar situations that have arisen in the antitrust context. For example, in the context of continuing violations of the Sherman and Clayton Acts, the Court has concluded:

> "In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, [the general rule] has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Zenith*, 401 U.S. at 338.

2. This application of the general Clayton Act accrual rule, however, has several, important limitations. First, "damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period." *State Farm*, 828 F.2d at 5 (Kennedy, J., concurring). Second, illegal acts within the limitations period do not resurrect claims for prior injuries sustained *outside* the limitations period. *Johnson* v. *Nyack Hosp.*, 891 F. Supp. 155, 162 n.5 (S.D.N.Y. 1995), aff'd, 86 F.3d 8 (2d Cir. 1996). Third, to restart the statute of limitations for injuries caused by an overt act within the limitations period, the overt act must be "a new and independent act that is not merely a reaffirmation of a previous act" and it must "inflict new and accumulating injury." *Pace Indus., Inc.* v. *Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987); *McCool* v. *Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992). Thus, claimants injured by continuing violations may recover treble damages only for those distinct injuries caused by acts within the four-year

limitations period. See *Hennegan* v. *Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300-1301 (9th Cir. 1986).

Fourth, if future injuries of the same sort are highly probable and reasonably calculable, the limitations period begins to run at the time of the earliest injury. Thus, when that initial claim accrues, the plaintiff may recover "not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial." *Zenith*, 401 U.S. at 339. The plaintiff may recover these future damages only if the plaintiff commences the lawsuit within four years of the original injury; otherwise, recovery for these future damages is time-barred. Concomitantly, "future damages that might arise from the conduct sued on are unrecoverable [at the time of the original injury] if the fact of their accrual is speculative or their amount and nature unprovable." *Ibid.* In such instances, a cause of action as to those damages accrues, if at all, "only on the date they are suffered." *Ibid.*[7]

Thus, the "separate accrual" rule under the Clayton Act fairly and comprehensively addresses two distinct situations. One is the situation in which a single victim suffers multiple injuries caused by multiple violations, only some of which occurred during the limitations period. The other is the situation in which no wrongful act occurred within the limitations period but the victim suffered some injury within

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[7] "[U]ncertain damages, which prevent recovery, are distinguishable from uncertain extent of damage, which does not prevent recovery. The former denotes failure to establish an injury, while the latter denotes imprecision with regard to the scope or extent of the injury. The question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury." *Pace Indus.*, 813 F.2d at 240.

Consequently, this aspect of the Clayton Act accrual rule rarely delays accrual of the claim. See 1 CORMAN, *supra*, § 6.5.5.3, at 459-460.

the period that was not recoverable at the time of the earlier illegal act. The proper "separate accrual" rule for both antitrust and civil RICO claims combines both modifications in one rule. Thus, when a plaintiff suffers either a *new* and *independent* injury caused by a continuing series of illegal acts or a *future* injury that was speculative or unprovable at the time of the original injury, a cause of action accrues for that additional injury — but only for that separate and distinct injury — at the time it is suffered.

3. Although the petitioners and their *amici* endorse the "separate accrual" rule, they all contest the requirement that the subsequent injuries be "new" and "independent". See Pet. Br. at 43-44; NASCAT Am. Br. at 11-12; Forbes Am. Br. at 25. As noted above, the separate accrual rule in the antitrust or civil RICO context addresses two situations. The first is the continuing violation; the second involves suits seeking compensation for future damages that were speculative at the time of the original injury.

As to the former situation — where the plaintiff seeks to recover damages for injuries caused by a continuing series of illegal acts — the requirement that the injury be independent serves to ensure that the injuries claimed are, in fact, the product of the illegal act within the limitations period and not of a prior act committed outside the period. Compare *Bingham* v. *Zolt*, 66 F.3d 553, 561 (2d Cir. 1995) (holding separate accrual rule satisfied where "each illegal diversion constituted a new and independent legally cognizable injury"), cert. denied, 116 S.Ct. 1418 (1996) with *Grimmett* v. *Brown*, 75 F.3d 506, 514 (9th Cir. 1996) (holding separate accrual rule not satisfied where injuries were the same as those allegedly caused by previous acts committed outside limitations period), cert. dismissed as improvidently granted, 117 S.Ct. 759 (1997). Absent this requirement, there would be no way of guaranteeing that a plaintiff was recovering damages "resulting *only* from those acts committed less than four years before commencement of his suit." *Imperial Point*

Colonnades Condominium, Inc. v. *Mangurian*, 549 F.2d 1029, 1034 (5th Cir. 1977) (emphasis added).[8]

As to the other situation — where the injuries within the limitations period were too uncertain or speculative when the earlier injury occurred — the requirement that an injury be "separate and independent" of prior, time-barred injuries serves as a proxy for the speculativeness determination required by *Zenith*. See *Bingham*, 66 F.3d at 561 ("The speculative-versus-determinable language corresponds in practice to the underlying notion that a new and independent injury must occur to give rise to a separately-accruing civil RICO action under the rule of *Bankers Trust*.").

Amicus NASCAT claims that the "separate accrual" rule does permit victims to recover for subsequent, additional injuries that occur within the limitations period even if those injuries were caused by acts outside the limitations period. See NASCAT Am. Br. at 10. To support this amazing contention, NASCAT cites *Davis* v. *Grusemeyer*, 996 F.2d 617, 623 (3d Cir. 1993), which involves not the "separate accrual" rule but rather the Third Circuit's indefensible "last predicate act" rule.[9]

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[8] The requirement does not, as petitioners and their *amicus* Forbes claim, put plaintiffs in the impossible position of demonstrating "relatedness" to satisfy the pattern requirement and "unrelatedness" to satisfy the separate accrual rule. Pet. Br. at 43; Forbes Am. Br. at 26-27. To satisfy the separate accrual rule, RICO plaintiffs need only show that the subsequent predicate act produced new *injuries* distinct from the injuries caused by earlier predicate acts outside the limitations period; the rule does not require that the *predicate acts* themselves be independent or unrelated.

[9] Even *Davis* does not support the broad contention advanced by NASCAT. That case rejected the RICO plaintiff's claim that he could recover for subsequent injuries suffered within the limitations period, noting that such injuries must constitute "'a new and distinct injury from

(continued...)

As cases addressing the "separate accrual" rule and its antitrust precursors make clear, however, plaintiffs generally cannot recover for subsequent, related injuries occurring in the limitations period that were caused by acts outside the period. To the contrary, in *Zenith*, this Court held that injuries that were caused by acts outside the limitations period were time-barred, unless the plaintiff could demonstrate that the injuries were too speculative for the plaintiff to commence a lawsuit at the time of the original act. *Zenith*, 401 U.S. at 339. See *Long Island Lighting Co.* v. *Imo Indus. Inc.*, 6 F.3d 876 (2d Cir. 1993) (holding claim for injuries within limitations period was time-barred where injuries were not speculative at time of original injury). Similarly, courts applying the "separate accrual" rule in civil RICO suits adhere to the rule that, except for "late-developing injuries" that could not be proved in an earlier lawsuit, "[d]ifferent injuries flowing from the same conduct" do not trigger a new limitations period. *McCool*, 972 F.2d at 1465 n.10. Rather, "a new cause of action accrues only when there is a new instance of wrongful conduct *and* a new injury." *Ibid.*; see also *State Farm*, 828 F.2d at 5 (Kennedy, J., concurring).

In short, in borrowing the Clayton Act accrual rule, it also makes sense to borrow the "separate accrual" rule as articulated in *State Farm*, *McCool*, and *Bingham*. As in antitrust lawsuits, these modifications to the Clayton Act accrual rule would mitigate any potential harshness in applying the Clayton Act accrual rule in civil RICO cases when the claimant suffers separate and distinct but continuing injuries.

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[9] (...continued)
the initial injury.'" 996 F.2d at 627 (quoting *Glessner* v. *Kenny*, 952 F.2d 702, 708 (3d Cir. 1991)).

II. IF SOME "DISCOVERY" REQUIREMENT IS TO BE SUPERIMPOSED IN RICO CASES, IT SHOULD APPLY ONLY TO THE EXISTENCE OF THE INJURY.

If, despite the foregoing arguments, the Court concludes that the Clayton Act accrual rule does not apply to civil RICO suits and that some discovery rule is warranted, we submit that the "injury discovery" rule adopted by a majority of the circuits is the appropriate one. In contrast to the "last predicate act" rule proposed by petitioners and the "injury-and-pattern discovery" rule adopted by the court below, the "injury discovery" rule appropriately balances the salutary purposes of statutes of limitations with the added deterrence ostensibly provided by private enforcement of RICO.

A. Statutes Of Limitations Serve Critical Functions That Cannot Be Overlooked In Determining What Accrual Rule To Adopt.

> "Statutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

Indeed, from the earliest days of the Republic to the present, this Court has held to the view that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams* v. *Wood*, 2 Cranch 336, 342 (1805)). See also *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitations "'are

found and approved in all systems of enlightened jurisprudence'") (quoting *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879)).

Despite the claims of the petitioners and their *amici*, these principles apply with equal force to civil RICO claims. Indeed, this Court recognized the importance of the statute of limitations in civil RICO suits, observing that, without a statute of limitations, "'[d]efendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.'" *Agency Holding*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.34). A statute of limitations is not a mere obstacle to be brushed aside, as petitioners would have it, when "remedial" purposes require; rather, it should be regarded "as a 'meritorious defense, in itself serving a public interest'" *Kubrick*, 444 U.S. at 117 (quoting *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)); see also *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 452-453 (7th Cir. 1990) (Posner, J.) ("Statutes of limitation are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application.").

B. In Those Areas Of Law Recognizing A Discovery-Based Accrual Rule, The Discovery Requirement Is Limited To The Injury Element.

Given the importance of statutes of limitations and the purposes they serve, it was well settled at common law that, as a general rule, causes of action accrued and statutes of limitation began to run as soon as there was a "complete and present cause of action." *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941). See also 54 C.J.S. *Limitations of Actions* § 81, at 116 (1987) ("Unless a statute provides otherwise, the statute of limitations begins to run at the time when a complete cause or right of action accrues or arises, which occurs as soon as the right to institute and maintain a suit arises."). In other words, the *existence* of the elements of the cause of action,

not the plaintiff's *knowledge* of all or some of those elements, triggered the statute of limitations:

> "Generally, mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations. Except where modified by statute, the rule is that the cause of action accrues when the act upon which the legal action is based took place and not when the damage became known. Difficulty in ascertaining the existence of a cause of action is irrelevant." *Id.* § 87, at 123 (footnotes omitted).

Beginning in the latter part of this century, some courts fashioned a "discovery" requirement as an exception to the general rule in narrow categories of cases. That "discovery" exception — which provides that the statute of limitations begins to run from the date the plaintiff discovered or reasonably should have discovered *the injury* — was developed in medical malpractice cases to address the problems of foreign objects left in patients' bodies during surgery and in occupational disease cases to address the problem of diseases with long latency periods. See 2 CORMAN, *supra*, §§ 11.1.2.1, 11.1.2.3; 54 C.J.S. *Limitations of Actions* § 87, at 124.

It is unclear whether the discovery rule has become the "general" or "presumptive" accrual rule.[10] Those decisions

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[10] Some cases have stated broadly that, "[u]nder federal principles, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action," *Cullen* v. *Margiotta*, 811 F.2d 698, 725 (2d Cir. 1987) (quoting *Pauk* v. *Board of Trustees of City Univ.*, 654 F.2d 856, 859 (2d Cir. 1981)), or that the discovery rule applies "in the absence of a contrary directive from Congress." *Cada*, 920 F.2d at 450. In 1991, then-Judge Ruth Bader Ginsburg noted that a majority of the circuits agreed that the discovery rule is "the general accrual rule in federal courts." *Connors* v. *Hallmark & Son Coal Co.*, 935 F.2d 336,

(continued...)

adopting the rule, though, carefully limit its scope. For example, in *Kubrick*, this Court rejected the argument that a cause of action for medical malpractice under the Federal Tort Claims Act ("FTCA") accrued only when the plaintiff discovered that his injury was the result of medical malpractice. 444 U.S. at 123. The Court noted that a plaintiff who knows that he has suffered an injury has sufficient information to begin investigating the existence of a cause of action. See *id.* at 122-124.[11] To require that the plaintiff amass more information before triggering the statute

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[10] (...continued)
342 (D.C. Cir. 1991). Judge Ginsburg recognized, however, that the antitrust accrual rule is an exception to this "injury discovery" approach. *Id.* at 342 n.10.

[11] The Court did not hold that it was *necessary* for the plaintiff to know who or what caused his injury, only that such information was *sufficient* to trigger the statute of limitations. See 444 U.S. at 120 ("[T]he Court of Appeals recognized that the general rule under the Act has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that *in medical malpractice cases* the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause. But even so — and the United States was prepared to concede as much *for present purposes* — the latter rule would not save Kubrick's action since he was aware of these essential facts [more than two years before he filed suit].") (emphasis added).

Even if *Kubrick* could be understood to have left room to create an "injury and cause discovery" rule in medical malpractice cases under the FTCA, it would hardly support the "injury and *pattern* discovery" rule adopted by the Eighth Circuit. Quite simply, the cause of injury under RICO is the predicate act, not the pattern. *Sedima*, 473 U.S. at 497 ("Any recoverable damages occurring by reason of a violation of § 1962(c) [of RICO] will flow from the commission of the predicate acts."). Just as the Court refused to allow FTCA suits to be delayed until discovery that the injury resulted from a breach of the duty of care, there is no basis here for allowing delay of RICO suits until discovery that the act causing the plaintiff's injury was part of a "pattern".

of limitations "would undermine the purpose of the limitations statute." *Id.* at 123.

As *Kubrick* illustrates, the discovery principle, when it applies, extends only to the plaintiff's knowledge of his injury, not to his knowledge of other elements of his claim. Indeed, even *amicus* NASCAT acknowledges that fact elsewhere in its brief. See NASCAT Am. Br. at 22 ("Under the discovery rule, courts often find that the statute of limitations does not begin to run until the proposed plaintiff learns or should learn that he has been *injured*.") (emphasis in original).

There is no reason to go beyond this understanding of the discovery rule in civil RICO suits. The civil RICO plaintiff's injury provides sufficient information and incentive to begin investigating the injury and to commence any appropriate lawsuit. A more expansive discovery rule would permit plaintiffs to bring actions long after their injury, perhaps fourteen years afterward. Such a result cannot be squared with statutes of limitations in general or this Court's decision in *Agency Holding*. See *Rodriguez* v. *Banco Central*, 917 F.2d 664, 667 (1st Cir. 1990) (Breyer, C.J.). Thus, if any discovery requirement is appropriate, the civil RICO plaintiff's cause of action should accrue when the plaintiff discovers his injury or reasonably should have discovered it.

C. Petitioners' And Their *Amici*'s Criticism Of The "Injury Discovery" Rule And, By Implication, The Clayton Act Accrual Rule Is Misguided.

Petitioners, their *amici*, and some of the courts of appeals level one principal criticism against the "injury discovery" rule and, by implication, the Clayton Act accrual rule. They claim that the "injury discovery" rule could result in the statute of limitations running before a cause of action exists. See Pet. Br. at 32 n.10; NASCAT Am. Br. at 6-7; Forbes Am. Br. at 17; *Keystone Ins. Co.* v. *Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988). To illustrate, NASCAT

hypothesizes an imaginary plaintiff who is injured by one predicate act in 1990, which the plaintiff discovers in 1994, and by another predicate act, which the plaintiff does not discover until the year 2000. Evidently believing that the conclusion speaks for itself, NASCAT notes that the civil RICO statute of limitations for the first predicate act will have lapsed by the time the plaintiff discovers the pattern necessary to commence a civil RICO action. NASCAT Am. Br. at 7 & n.8. This argument is a red herring.

First, NASCAT assumes that there must be a RICO cause of action for the injury caused by the first predicate act. The RICO civil remedy, however, is only available to a person "injured in his business or property *by reason of a violation* of section 1962 of this chapter." 18 U.S.C. § 1964(c) (emphasis added). A lone predicate act, however, does not constitute a pattern of racketeering activity, see 18 U.S.C. § 1961(5) (requiring "at least two acts racketeering activity" within in 10 years of each other), and, therefore, does not constitute a violation of section 1962. See 18 U.S.C. § 1962 (requiring as an element of each offense "a pattern of racketeering activity"). In short, a person injured by a criminal offense, which subsequently turns out to be the first predicate act in a pattern of racketeering activity, has not been "injured * * * by reason of a violation of section 1962," and no civil RICO claim exists. See *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) (noting that plaintiff "can recover only to extent he has been injured in his business or property by the conduct constituting the violation"). The clear language of the statute compels this conclusion.

This understanding neither undermines deterrence nor undercompensates victims of RICO predicate acts. To begin with, the person injured by the first offense has full recourse to applicable state and federal causes of action, which permit full compensation, *plus* punitive damages in most states, *plus* double or treble damages if the defendant's conduct violated

a state deceptive trade practices statute. In addition, the victim of the subsequent acts establishing a RICO "pattern" — whether it be the same or a different person — is entitled to recover treble damages under RICO for any injuries caused by those acts. The prospect of substantial liability for both the first and subsequent acts should adequately deter defendants from engaging in a pattern of racketeering.

Second, even if the initial predicate act gave rise to a potential civil RICO claim, the fear that the "injury discovery" rule would foreclose civil RICO claims based upon later, undiscovered injuries to strangers would not warrant rejecting the rule. NASCAT's hypothetical plaintiff is a rare breed. As then-Chief Judge Breyer noted in reference to a similar hypothetical, "it seems unlikely that this type of example will arise very often." *Rodriguez*, 917 F.2d at 667. As such, adopting an accrual rule to conform to the tiny minority of cases would serve only to create a windfall for the plaintiffs in the vast majority of civil RICO cases. At most, NASCAT's hypothetical would justify adopting a suitable tolling rule for the extraordinary case, not a general rule of accrual for all cases. *Ibid.*; *McCool*, 972 F.2d at 1465.

III. BOTH THE "INJURY AND PATTERN DISCOVERY" RULE AND THE "LAST PREDICATE ACT" RULE ARE UNSUITABLE.

A. The "Injury And Pattern Discovery" Rule Gives Inadequate Weight To The Strong Federal Interest In Barring Stale Claims.

As explained above, the "injury and pattern discovery" rule ignores the settled principle that the discovery rule, to the extent that it applies, extends only to the plaintiff's *injury*. There is no indication that Congress intended to depart from this principle, and, in the absence of such indication, this Court should refrain from expanding the discovery rule to cover the "pattern" element.

Moreover, the "injury and pattern discovery" rule threatens to postpone indefinitely the running of the statute of limitations. The concept of a "pattern" is a nebulous one, see *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., concurring in the judgment), and courts are sure to be hesitant in imputing knowledge of it to a plaintiff unschooled in the nuances of civil RICO jurisprudence. Indeed, precisely because of the vagaries involved in determining whether or not a pattern exists, an "injury and pattern discovery" rule will undermine "the federal interest * * * in having 'firmly defined, easily applied rules'" governing statutes of limitations. *Wilson*, 471 U.S. at 270 (quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)).

B. The Petitioners' And Their *Amici*'s Policy-Laden Arguments In Favor Of The "Last Predicate Act" Rule Do Not Withstand Scrutiny.

The "last predicate act" rule adopted by the Third Circuit and endorsed by petitioners and their *amici* is even more unbalanced than the "injury and pattern discovery" rule. This proposed rule lacks support in any other branch of civil jurisprudence. Nowhere else does a potential defendant's commission of a wrongful act directed at a third person revive the long-lapsed claim of an unrelated plaintiff.

At bottom, the petitioners and their *amici* rest their argument for the open-ended "last predicate act" accrual rule upon hortatory blandishments about the need to further RICO's deterrent purposes by permitting "private attorneys general" to enforce the Act. This rhetoric, of course, ignores the origin of the "private attorney general" — antitrust treble damage suits under the Clayton Act, for which claims accrue upon injury. This Court should see their arguments for what they are — a blatant attempt to substitute policy statements (statements more appropriately addressed to Congress than this Court) for legal arguments that come to grip with RICO's text, its legislative history, and this Court's decisions

interpreting the statute. Even on their own terms, however, their arguments do not warrant the adoption of the "last predicate act" rule.

1. The Petitioners and their *amici* defend the "last predicate act" rule by asserting that it is the accrual rule for criminal prosecutions under RICO. See Pet. Br. at 25-27; NASCAT Am. Br. at 20; Forbes Am. Br. at 7-9.[12] According to petitioners, the reasoning justifying the "last predicate act" rule for criminal prosecutions "applies with equal force to civil RICO." Pet. Br. at 27. Petitioners could not be further from the truth.

First, in *Agency Holding*, this Court expressly rejected the contention that the statute of limitations for criminal prosecutions under RICO should govern civil suits. 483 U.S. at 156. It would be incongruent, to say the least, to adopt for civil RICO suits an accrual rule drawn from the criminal context after having refused to borrow the criminal statute of limitations as inappropriate.

Second, the criminal accrual rule does not mesh with the civil RICO remedy. A criminal RICO count charges the

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[12] Although one would never know it from reading the briefs of petitioners' or their *amicus* Forbes, the "last predicate act" rule is not *the* accrual rule for criminal RICO prosecutions. To the contrary, the date that a criminal RICO prosecution "accrues" depends upon the exact section of the act that is the basis for the prosecution. Although the statute of limitations for prosecutions for violations of section 1962(c) runs from the date of the last predicate act committed by the defendant, see *United States* v. *Bethea*, 672 F.2d 407, 419 (5th Cir. Unit B. 1982), the statute of limitations for violations of section 1962(d), which criminalizes RICO conspiracies, begins to run when the purposes of the conspiracy are accomplished or abandoned, regardless of when the predicate acts, if any, were committed. *United States* v. *Persico*, 832 F.2d 705, 713 (2d Cir. 1987). Moreover, the statute of limitations for violations of section 1962(a) begins to run when the defendant uses or invests the income derived from a pattern of racketeering activity. See *United States* v. *Vogt*, 910 F.2d 1184, 1195-97 (4th Cir. 1990).

defendant with violating RICO by a course of conduct. "The triggering event under subsection (c) may therefore rightly be identified as the last predicate act making up the pattern of racketeering activity because that also marks consummation of the conduct proscribed." *United States* v. *Vogt*, 910 F.2d 1184, 1196 (4th Cir. 1990). A civil RICO claim, by contrast, seeks to recover damages caused by the predicate acts, not the RICO offense itself. See *Sedima*, 473 U.S. at 497 (noting that "[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts"). For this reason, a civil claimant's allegation of a RICO conspiracy does not affect the limitations period, since any actionable "injury" flows from commission of the specific predicate crime impacting the plaintiff. See *Bivens Gardens Office Bldg., Inc.* v. *Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1550 n.7 (11th Cir. 1990); *Compton* v. *Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984). Consequently, the "last predicate act" approach, which is well suited in the criminal context where the Government prosecutes defendants for the course of conduct as a whole, is ill-suited for the civil context where the plaintiff seeks to recover treble damages only for injuries caused by a predicate act.

Third, analogizing to the criminal RICO context actually undermines any argument for adopting the "last predicate act" approach to civil RICO suits. Significantly, the commission of a predicate act within the limitations period only permits a prosecution for the RICO offense as a whole; it does not resurrect time-barred prosecutions for earlier predicate acts committed outside the relevant limitations periods. See *United States* v. *Boffa*, 513 F. Supp. 444, 479 (D. Del. 1980) (noting that Government could not prosecute criminal conduct occurring more than five years before indictment but could charge such conduct as predicate acts of RICO offense); *United States* v. *Castellano*, 610 F. Supp. 1359, 1381-1384 (S.D.N.Y. 1985) (dismissing as time-barred counts charging

conduct over five years old at time of indictment but rejecting claim that those counts could not serve as predicate acts for RICO count). Indeed, to permit plaintiffs to recover civil damages for injuries caused by predicate acts committed outside the limitations period would place the civil plaintiff in a *better* position than the Government, which cannot prosecute the defendant for those offenses.[13]

2. Petitioners' *amici* argue that any proposed accrual rule must be "reconciled" with 18 U.S.C. § 1961(5), which defines a "pattern of racketeering activity" to include at least two predicate acts committed within ten years of each other. NASCAT Am. Br. at 18. Quoting from the Third Circuit's opinion in *Keystone*, both NASCAT and Forbes claim that the ten-year limit reflects Congress' intent to permit suits for damages caused by predicate acts committed more than four years before the suit was commenced. *Ibid.*; Forbes Am. Br. at 12-13.

The short answer is that the definition of pattern does not indicate that Congress envisioned, much less intended to license, civil suits seeking damages for predicate acts outside the limitations period. Congress crafted the "pattern" concept while the RICO bill was exclusively a criminal measure; the later decision to engraft a private civil remedy cannot be understood as revolutionizing established statute-of-limitations principles. Indeed, *amici*'s goal — to legitimate civil suits filed within four years of the last predicate act but seeking damages for predicate acts committed as much as fourteen years earlier — directly contradicts this Court's decision in *Agency Holding* that civil RICO suits be subject to a four-year

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[13] Like the Government in a criminal prosecution, civil RICO plaintiffs injured by subsequent predicate acts may introduce evidence of earlier, time-barred acts to establish a "pattern" of racketeering activity. *Cf. United States v. Walsh*, 700 F.2d 846, 852 (2d Cir. 1983).

statute of limitations. See also *Rodriguez*, 917 F.2d at 667 (Breyer, C.J.).[14]

3. Finally, the by-now tired refrain that RICO is to be "liberally construed" to accomplish the Act's remedial and deterrent purposes is not an open invitation to accept whatever argument a RICO plaintiff is currently proffering. See Forbes Am. Br. at 9. Indeed, that bromide did not prevent the Court from interpreting RICO to embody a rigorous proximate-cause requirement. See *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 265-274 (1992). It did not prevent the Court from holding that the defendant must have participated in the management or operation of the enterprise to be subject to RICO liability. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-184 (1993). It did not prevent the Court from rejecting broad interpretations of the "pattern" requirement. See *H.J. Inc.*, 492 U.S. at 236, 243 n.4 (rejecting notions that "a pattern is established merely by proving two predicate acts" and that RICO applies to short periods of criminal activity that are unlikely to recur in the future). And, most importantly, it did not prevent the Court from borrowing the Clayton Act's statute of limitations. See *Agency Holding*, 483 U.S. at 155-156 (rejecting use of the longer statute of limitations for criminal RICO violations). Whatever practical value lies in that interpretive directive, it does not justify renouncing long-settled principles underlying statutes of limitations to create an accrual rule that licenses lawsuits long after the illegal act has occurred and witnesses' memories have begun to fade.

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[14] If a RICO "pattern" may last longer than ten years, the "last predicate act" approach could theoretically keep a particular civil claim alive virtually forever. See *Rodriguez*, 917 F.2d at 667 (Breyer, C.J.).

IV. EQUITABLE PRINCIPLES DO NOT TOLL THE STATUTE OF LIMITATIONS WHEN A PLAINTIFF DOES NOT EXERCISE REASONABLE DILIGENCE IN DISCOVERING THE CLAIM.

There is no doubt that some equitable tolling principles apply to the Clayton Act's statute of limitations. See *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 558-559 & n.29 (1974); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 338 n.* (1978) (Burger, C.J., concurring). In *American Pipe*, the Court suggested that the four-year statute may be tolled "because of inducement by the defendant" not to sue within the period or "because of fraudulent concealment." 414 U.S. at 559. Since *Agency Holding* applied the Clayton Act's statute of limitations to civil RICO suits, it follows that these equitable tolling principles should apply to civil RICO suits as well. Indeed, several courts have concluded that "standard" tolling principles apply in civil RICO suits. See, *e.g.*, *Rodriguez*, 917 F.2d at 667-668; *Bankers Trust Co.*, 859 F.2d at 1105.

All equitable tolling doctrines, however, contain the due diligence requirement that the court below found petitioners had failed to satisfy. The requirement that the plaintiff exercise reasonable diligence in discovering the claim is built into the definition of "equitable tolling." In addition to showing that the defendant took steps to conceal the fraud or other illegal act, a plaintiff seeking equitable tolling must also prove that he did not and could not "with due diligence" obtain essential information for commencing a suit. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (noting that "where a plaintiff has been injured by fraud and 'remains in ignorance of it *without any fault or want of diligence or care on his part*, the bar of the statute does not begin to run until the fraud is discovered'") (quoting *Bailey* v. *Glover*, 88 U.S. 342, 348 (1874) (emphasis added)). Indeed, even the petitioners and *amicus* NASCAT concede as much. See Pet. Br. at 45; NASCAT Am. Br. at 24-25.

The crux of the dispute in this case centers upon whether the branch of equitable tolling sometimes called "equitable estoppel" or "fraudulent concealment" is available to a plaintiff who fails to exercise due diligence when confronted with affirmative acts by the defendant intended to gull the prospective claimant. This Court, however, has repeatedly observed that the plaintiff has a duty of diligent inquiry even if the defendant actively conceals his wrongdoing. For example, over 120 years ago, this Court stated:

> "[W]hen there has been *no negligence or laches on the part of a plaintiff* in coming to the knowledge of the fraud which is the foundation of the suit, *and when the fraud has been concealed*, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 349-350 (1874) (emphasis added).

See also *Wood* v. *Carpenter*, 101 U.S. 135, 143 (1879); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."). Indeed, in defining the "fraudulent inducement" branch of equitable estoppel, this Court has insisted that the plaintiff seeking to avoid the limitations bar must prove that he "was *justifiably* misled into a *good-faith* belief" that he need not bring suit. *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 235 (1959) (emphasis added).

Petitioners conveniently ignore these decisions, preferring instead to contest the wisdom of such a policy. Specifically, they contend that imposing a duty to exercise reasonable diligence confuses the "discovery" rule with "fraudulent concealment." Pet. Br. at 46. Relatedly, they claim that such a duty fails to punish a defendant for acts of concealment and requires the plaintiff to discover not only the cause of action but also the concealment itself. *Id.* at 46-47.

These criticisms miss the mark. Requiring the plaintiff to act diligently does not fail to "punish" the defendant for the fraudulent concealment. To the contrary, the defendant still loses the benefit of the statute of limitations until a plaintiff acting diligently under all the circumstances, which include the act of concealment, would discover the claim.

Nor is there any overlap between the applicable accrual rule and the "fraudulent concealment" doctrine. As explained above, the antitrust accrual rule, which should apply to civil RICO suits, does not require any discovery. *If* the applicable accrual rule includes some discovery element, however, it does not follow that this Court should drop the due diligence duty from the "fraudulent concealment" doctrine. To the contrary, that doctrine is inapplicable in situations where the "discovery" rule applies. As discussed above, courts have departed from the common law accrual rule and adopted the "discovery" rule to respond to situations in which the plaintiff, *despite his own diligence*, could not reasonably be expected to know of his injury. Not surprisingly, this same concern was the original justification prompting equity courts to estop defendants from pleading the statute of limitations in cases of fraudulent concealment, see *Wood*, 101 U.S. at 139, and it continues to underlie the doctrine today. In short, the "discovery" rule has supplanted the need for the "fraudulent concealment" doctrine. Although dropping the requirement that a plaintiff exercise reasonable diligence would certainly differentiate the "fraudulent concealment" doctrine from the "discovery" rule, it is not a good reason for changing one sound rule that another rule now supersedes it in some cases.

At bottom, petitioners propose a tolling rule that equally benefits the indolent as well as the diligent — a stunning proposition for a rule derived from equity. Indeed, because those who act diligently already are fully protected, only the unreasonably inattentive stand to gain from the adoption of petitioners' proposed rule. As the Sixth Circuit pointedly commented in rejecting the same arguments:

> "[The plaintiff] would have the statute tolled indefinitely, while evidence stales, memories fade and courts and adversaries wait, until the plaintiff at his leisure alleges actual discovery, despite the avalanche of evidence that would put all but the most indiligent plaintiffs on notice of a cause of action." *Campbell* v. *Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982).

Noting the salutary purposes served by statutes of limitation, the Sixth Circuit concluded that "[a] plaintiff who requests the avoidance of these important objectives owes the courts, the public and his adversaries a duty of diligence in discovering and filing his lawsuit." *Ibid.*

CONCLUSION

All of petitioners' arguments share one purpose: to eviscerate the civil RICO statute of limitation as a practical matter. This Court in *Agency Holding*, however, rejected the suggestion that civil RICO suits were subject to no limitations period. 483 U.S. at 156. This Court should not now welcome through the backdoor a rule of law that it refused at the front.

Respectfully submitted.

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